UNITED STATES OF AMERICA	)	
	)	**Prosecution Motion**
v.	)	
	)	**for Preliminary Determination**
Manning, Bradley E.	)	**of Admissibility of**
PFC, U.S. Army,	)	**MRE 404(b) Evidence**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**3 August 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The Prosecution in the above case respectfully requests that this Court make preliminary determinations on the admissibility of evidence of crimes, wrongs, or acts that are not being used to prove character IAW Military Rule of Evidence (MRE) 404(b) and on the use of evidence to rebut the offer of a pertinent character trait of the Accused IAW MRE 404(a). The Government seeks said preliminary determinations to increase the efficiency of the proceedings and to ensure the trier of fact is only presented admissible evidence. See RCM 916(b)(13), discussion.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue, the resolution of which is necessary to decide a motion, shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue, the resolution of which is necessary to decide a motion, shall be on the moving party. RCM 905(c)(2). The United States has the burden of persuasion as the moving party.

FACTS

The Accused is charged with one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of violations of 18 U.S.C. § 793(e), five specifications of violations of 18 U.S.C. § 641, two specifications of violations of 18 U.S.C. § 1030(a)(1), and five specifications of violating a lawful general regulation, in violation of Articles 104, 134, and 92, Uniform Code of Military Justice (UCMJ). See Charge Sheet.

The Accused attended Advanced Individual Training (AIT) in Fort Huachuca, Arizona from April 2008 to August 2008. See Prosecution Exhibit (PE) 4. His platoon sergeant was (b) (7)(C) B.M. See Enclosure 1. AIT began with a block of instruction on INFOSEC, which teaches the military analyst how to handle and safeguard classified information. Id. The INFOSEC training block of instruction included training on how to properly mark and handle classified information, the meaning of the various classifications, how to effectively use the internet, the value of the internet in research and collection, and operational security including the enemy's use of the internet. See PE 5.

In June 2008, the Accused received corrective training. See Enclosure 1. (b) (7)(C) B.M. required the Accused to give a presentation to the platoon at formation, present a PowerPoint

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presentation to (b) (7)(C) B.M. and prepare a written product. The corrective training was a result of the Accused posting videos on YouTube where he used "buzzwords" such as top secret, secret, classified, and SCIF, which he was taught not to do. (b) (7)(C) B.M. saw one of the videos on YouTube in which the Accused discussed his work in a "secret SCIF" and his handling of classified information. Enclosure 1.

The presentation to the platoon discussed information security, proper handling of information, a Soldier's obligation to protect and not expose classified material, the possibility that a Soldier's disclosure that he or she has access to classified material may be dangerous to the Soldier, and that enemy forces are trying to collect information on the U.S. Military. Id. The written product defined secret information and identified the type of people who try to collect information for use against the United States, such as foreign governments, enemies, spies, hackers, etc. Id. The PowerPoint presentation closely mirrored the written product. Id. The PowerPoint presentation was found on the Accused's external hard drive. See Enclosure 2.

In approximately March 2009, (b) (7)(C) J.S. became the Accused's supervisor at Fort Drum, New York. Enclosure 3. Both she and the Accused were assigned the MOS 35F and attended training together at the unit, including JRTC training. Id. They also deployed together in October 2009. Id. Before the deployment, (b) (7)(C) J.S. counseled the Accused on his military bearing. Id. During this counseling, (b) (7)(C) J.S. asked the Accused what the flag meant to him. Id. The Accused responded that the flag meant absolutely nothing to him, and he had no allegiance to the United States or its people. Id. (b) (7)(C) J.S. repeated the Accused's statement in a sworn statement given during the investigation into the Accused's misconduct. See Enclosure 4.

On 8 May 2010, the Accused punched (b) (7)(C) J.S. in the face. See Enclosure 5. Because of this misconduct, the Accused was removed from the 2-10 Mountain SCIF and assigned to work in the supply room. Enclosure 6. He also received an Article 15 for his misconduct. See Enclosure 5.

The prosecution provided the defense MRE 404(b) notice on 6 April 2012. Enclosure 7.

The prosecution published its witness list on 22 June 2012 and named both (b) (7)(C) (b) (7)(C) J.S. and (b) (7)(C) B.M. as witnesses. See Appellate Exhibit (AE) CLXII.

WITNESSES/EVIDENCE

The prosecution requests the Court consider the charge sheet and the 7 listed enclosures.

LEGAL AUTHORITY AND ARGUMENT

I. EVIDENCE OF THE ACCUSED'S OTHER WRONGS IS ADMISSIBLE FOR A NONCHARACTER PURPOSE

In general, MRE 404(a) prohibits admission of evidence of a person's character to prove

action in conformity therewith on a particular occasion. MRE 404(b), however, allows the introduction of evidence of other crimes, wrongs, or acts provided they are not used to show action in conformity with that character on a specific occasion. The prosecution may offer this non-propensity evidence against the Accused in its case in chief as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." United States v. Morrison, 52 M.J. 117, 121 (C.A.A.F. 1999) (citing MRE 404(b)). Evidence does not, however, need to fall within one of the nonpropensity examples given by MRE 404(b) to be admissible. United States v. Castillo, 29 M.J. 145, 150 (CMA 1989).

MRE 404(b) "is a rule of inclusion, not exclusion." United States v. Diaz, 59 M.J. 79, 93-94 (C.A.A.F. 2003); see also United States v. Tyndale, 56 M.J. 209, 212 (C.A.A.F. 2001); United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000). MRE 404(b) only excludes propensity evidence, and then goes on to give a nonexhaustive list of the purposes for which the evidence could be admissible. United States v. Johnson, 49 M.J. 467, 473 (C.A.A.F. 1998). "[T]he sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the Accused's predisposition to crime and thereby to suggest that the fact finder infer that he is guilty . . . ." Castillo, 29 M.J. at 150; see also Huddleston v. United States, 485 U.S. 681, 686 (1988).

To ensure the evidence has a proper purpose under MRE 104(b), 402, and 403, the U.S. Court of Appeals for the Armed Forces (CAAF) applies the following three-pronged test to determine the admissibility of other acts evidence under MRE 404(b): (1) Does the evidence reasonably support a finding by the fact finder that the Accused committed prior crimes, wrongs, or acts? (2) What fact of consequence is made more or less probable by the existence of this evidence? (3) Does the probative value substantially outweigh any potential unfair prejudice? Diaz, 59 M.J. at 94 (citing United States v. Reynolds, 29 M.J. 105, 109 (CMA 1989)). If the evidence meets each of these three tests, it is admissible. Id.

A. The Evidence Reasonably Supports a Finding by the Fact Finder that the Accused Committed Prior Bad Acts

Whether the evidence reasonably supports a finding that the Accused committed prior crimes, wrongs, or acts, "is founded on [MRE] 104(b) dealing with relevance conditioned on a fact." United States v. Acton, 38 M.J. 330, 333 (1994). The Court of Appeals has held that "[t]he threshold for this [first] prong of admissibility is low." Acton, 38 M.J. at 333; see also Browning, 54 M.J. at 6. Acton provides:

> [i]n determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides *whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.*

38 M.J. at 333 (citing Huddleston, 485 U.S. at 690) (emphasis added); see also Castillo, 29 M.J. at 151 ("[T]he military judge must admit the evidence if he concludes that the fact finder could reasonably find by a preponderance of the evidence that the other misconduct had occurred, even though the judge himself would not make such a finding.")

All three government witnesses ((b) (7)(C) J.S., (b) (7)(C) B.M., and (b) (7)(C) P.B.) testified under oath at the Article 32. In addition, (b) (7)(C) J.S. gave a sworn statement consistent with her Article 32 testimony regarding the Accused's disloyal statement. The government will offer the slideshow to support (b) (7)(C) B.M. statement, which was recovered from the Accused's external hard drive. The Accused's actions of punching (b) (7)(C) J.S. in the face is supported by the Article 15 the Accused received and its supporting documentation. Based on sworn testimony alone, the trier of fact could reasonably find that the Accused committed the misconduct in all instances.

All three witnesses are on the prosecution's witness list. Assuming the above evidence is again elicited under oath at trial, there is sufficient evidence to admit the uncharged misconduct subject to the introduction of the evidence at trial. Accordingly, the first prong of the Reynolds test is conditionally satisfied.

B. The Existence of this Evidence Makes Facts of Consequence More Probable

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In general, all relevant evidence is admissible. See MRE 402.

The Accused's infractions will directly assist the fact finder in deciding whether or not the Accused had the requisite knowledge to commit the misconduct. The evidence is not being offered to prove character. The training that the Accused presented to his platoon sergeant and his AIT class in response to his breach of INFOSEC/OPSEC shows that the Accused knew that information posted on the internet is accessible to and sought out by the enemy. See Charge Sheet, Charge II, Specification 1; see also Castillo, 29 M.J. at 151 (allowing the fact finder to consider uncharged misconduct between the Appellant and the victim to understand the significance of a gesture). Without discussing the underlying uncharged act, the fact finder will not be able to sufficiently comprehend why the Accused had to complete the various corrective training assignments.

The Accused's disloyal statement to (b) (7)(C) J.S. is evidence relevant to the Accused's state of mind. The evidence is not being offered to prove the character of the Accused nor is it being offered to prove motive. The evidence is being offered to show that the Accused made a statement that he had no particular loyalty to the country whose information it was his job to safeguard. The statement is evidence of the Accused's intent for the charged misconduct because it makes it more likely that the Accused did not care if the enemy had access to the information that was posted on the Internet. Specifically, it is circumstantial evidence that the Accused knowingly gave intelligence to the enemy in support of Charge I, Specification 1; that the Accused wrongfully and wantonly caused the information to be published on the internet with

knowledge that it would be accessible to the enemy in support of Charge II, Specification 1; that the Accused's conduct was willful in support of Charge II, Specifications 2, 3, 5, 7, 9, 10, 11, 12, 13, and 15; and that the Accused stole, purloined, or knowingly converted a thing of value to the United States in support of Charge II, Specifications 4, 6, 8, 12, and 16. See Charge Sheet; see, e.g., Huddleston, 485 U.S. at 685 ("Extrinsic acts evidence may be critical to the establishment of the trust as to a disputed issue, especially when that issue involves the actor's state of mind . . . ."); United States v. Humphreys, 57 M.J. 83, 91 (C.A.A.F. 2002) (Evidence of "other acts" of the Accused's inappropriate comments was admissible to show Accused's non-innocent intent in making charged inappropriate comment.)

The Accused's misconduct of punching (b) (7)(C) J.S. is necessary to show the timeline of the Accused's removal from the SCIF and placement in the Supply Room to work with (b) (7) P.B. (b) (7)(C) where the Accused's misconduct continued. Because of the battery, the Accused was removed from the 2-10 Mountain SCIF and assigned to work in the supply room. In the supply room, the Accused stole or converted the United States Forces-Iraq (USF-I) Global Address List (GAL). See Charge Sheet, Charge II, Specification 16. Without discussing the underlying misconduct, the sudden change in the Accused's position will be confusing to the panel and the timeline will be unclear. See Castillo, 29 M.J. at 150 ("It is unnecessary . . . that relevant evidence fit snugly into a pigeon hole provided by [MRE] 404(b).")

The uncharged misconduct makes facts of consequence more probable under the liberal admissibility standard outlined in MRE 402. The evidence is not being used to establish character, but is being used to show knowledge, state of mind, and a timeline of events. As such, the information will assist the fact finder in a proper determination on the merits, and satisfies the second prong of the Reynolds analysis.

C. The Probative Value Substantially Outweighs any Potential Unfair Prejudice

Prejudice alone is not sufficient to warrant exclusion. Evidence of a legal relevance theory should only be excluded when the probative value is "substantially outweighed" by the accompanying prejudicial dangers. United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981) (stating that striking a balance between probative value and prejudicial effect is left to the trial judge and that the balance "should be struck in favor of admission"). Virtually all evidence is prejudicial to one party or another. To justify exclusion the prejudice must be unfair. United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1998). However, "[a]n Accused is not immunized . . . against the Government's use of evidence of other misconduct because the other misconduct was especially flagrant and repugnant." Castillo, 29 M.J. at 151; see also United States v. Stokes, 12 M.J. 229, 239 (1982).

Relevant evidence must be weighed against its tendency to create *unfair* prejudice, mislead the fact finder, cause undue delay, or waste time. United States v. Dimberio, 56 M.J. 20, 24 (C.A.A.F. 2001) (emphasis added). Unfair prejudice occurs when the proffered evidence causes, or leads, the fact finder to make a decision on an improper basis. Old Chief v. United States, 519 U.S. 172, 180 (1997).

Although there is not a clear test to follow, CAAF has stated that factors for military judges to consider in conducting a balancing test are the following:

> the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

United States v. Berry, 61 M.J. 91 (C.A.A.F. 2005) (citing United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000)).

The Accused's INFOSEC/OPSEC breaches at AIT stand up to the factors in Berry. There is strong proof that the Accused committed the misconduct. His platoon sergeant saw and testified under oath to seeing the video posted on YouTube. In addition, CID recovered a corrective training PowerPoint from the Accused's external hard drive that corresponded to the date and content of the PowerPoint that the Accused presented to (b) (7)(C) B.M. The evidence is probative to the elements concerning the Accused's intent when he compromised information. In particular, the evidence directly establishes the Accused's knowledge required in Charge II, Specification 1. The evidence is also not particularly prejudicial to the Accused, apart from proving his knowledge, especially in light of the charged misconduct. The uncharged act shows a security infraction in a training environment. As stated, the misconduct is being used to elicit sufficient facts for the fact finder to understand the evidence on corrective training, thus minimal time will be spent on those cursory facts. The charged and uncharged misconduct are also temporally proximate as they occurred approximately eighteen months apart--one while the Accused was being trained in his MOS and one while the Accused was working in his MOS. The AIT misconduct occurred in June 2008 and the charged misconduct begins on or about 1 November 2009. The AIT misconduct was limited; however, the charged misconduct ranged over several months, not to mention several databases. There was no presence of intervening circumstances. The Accused committed the misconduct, it was reported by his peers, and it was dealt with by his supervisor. The acts complete a chronological and logical story; removing the acts would create confusing gaps.

(b) (7)(C) J.S. testimony regarding the Accused's disloyal statement also stands up to the factors in Berry. Consistent with her Article 32 testimony, (b) (7)(C) J.S. gave a sworn statement reporting the same misconduct by the Accused. The statement will likely be prejudicial to a panel of Soldiers; however, compared to the charged misconduct, the statement is not overly prejudicial when viewed in light of the probative value it has into the Accused's state of mind. All evidence presented to the fact finder regarding the Accused's serious misconduct will be prejudicial to the fact finder. Given the charged misconduct, however, the statement will likely not be a distraction to the fact finder who will be more focused on the serious misconduct charged. The testimony will take minimal time to elicit. The uncharged misconduct occurred in the months immediately preceding the unit's deployment, which is when, on or about November 2009, the charged misconduct began. The statement occurred during one counseling session; however, the charged misconduct ranged over several months, not to mention several databases.

There were no intervening circumstances; the Accused was in a counseling session with a superior, not in a casual setting with a friend.

The Accused's battery of (b) (7)(C) J.S. also stands up to the factors in Berry. The act was witnessed by several individuals and testified about under oath at the Article 32 by (b) (7) J.S (b) (7)(C) and others. The battery is relevant to show the circumstances of the Accused's removal from the SCIF and the corresponding timelines of the charged misconduct. There is no less prejudicial evidence to sufficiently explain the Accused's movement to the fact finder. Compared to the charged misconduct, the battery will offer little, if any, distraction for the fact finder. The time needed to show the uncharged misconduct will be very minimal. The uncharged misconduct occurred during the charged misconduct. The specific battery only occurred on one occasion; however, the charged misconduct ranged over several months, not to mention several databases. There was an intervening circumstance of a verbal disagreement between (b) (7)(C) J.S. and the Accused; however, that can also be elicited in testimony. The relationship between the parties varied between a superior-subordinate and peers; they were not friends.

In addition to withstanding the factors recommended in Berry, the defense will have ample opportunity at trial, through cross-examination and argument, to attack this evidence's meaning, importance, and weight. Furthermore, the Court can and should issue a limiting instruction to the panel that specifically discusses the permissible and impermissible uses of this evidence. These aspects of trial procedure will help to ensure that that the evidence is used only for its proper aforementioned purpose.

Because the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, the third Reynolds prong is satisfied in this case.

II. THE INFOSEC/OPSEC VIOLATIONS, DISLOYAL STATEMENTS, AND BATTERY OF (b) (7)(C) J.S. ARE ADMISSIBLE UNDER M.R.E. 404(A)(1) TO IMPEACH DEFENSE WITNESSES ON GOOD SOLDIER EVIDENCE.

Evidence of a person's character or a trait of character is generally not admissible for the purpose of proving action in conformity therewith on a particular occasion. MRE 404(a)(1). Evidence of a pertinent trait of character offered by an Accused, or by the prosecution to rebut the same, however, is admissible. Id. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 479 (1948); see also United States v. Johnson, 46 M.J. 8 (C.A.A.F. 1997).

If a defense witness offers opinion or reputation evidence that the Accused is a good Soldier, the prosecution can rebut that evidence. MRE 404(a)(1). On cross-examination, the Government may inquire into relevant specific instances of the Accused's conduct. MRE 405(a). The questions would refer to the relevant uncharged misconduct, such as the Accused's breach of INFOSEC/OPSEC at AIT, disloyal statements, and battery of (b) (7)(C) J.S. Specifically, the prosecution will test the foundation of the witness's opinion or reputation evidence by asking

"have you heard" or "did you know" questions of that witness. See, e.g., United States v. Pearce, 27 M.J. 121, 124 (C.A.A.F. 1988).

Based on the testimony of the witnesses at the Article 32, the sworn statement, the PowerPoint, the Article 15, and, presumably, the testimony the witnesses will give at trial, the Government has a good faith belief that the Accused did commit all the above discussed misconduct. Id.

The evidence is extremely probative into whether or not the Accused is a good Soldier. Good Soldiers do not breach the security of the information that they were trained to protect, they are loyal to the United States, and they do not punch their peers or superiors in the face. While certainly prejudicial to the defense, the evidence is not unfairly prejudicial such that it would be prohibited by MRE 403.

In addition, the defense will have ample opportunity to argue to the panel their theory of the case. Finally, if the defense believes the evidence is inordinately damaging to their case, they can choose not to call good Soldier witnesses. The risk of prejudice is "a risk undertaken by the defense in electing to present affirmative character evidence." Pearce, 27 M.J. at 125.

CONCLUSION

The prosecution requests the Court grant the prosecution's motion and preliminarily determine the uncharged acts are admissible pursuant to MRE 104(b), 402, 403, and 404(b), as all three Reynolds prongs are satisfied, and that the evidence is admissible for a different purpose under MRE 404(a)(1) if the defense presents good Soldier evidence.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense counsel on 3 August 2012.

ANGEL M. OVERGAARD
CPT, JA
Assistant Trial Counsel

7 Encls
1. Summarized Article 32 Testimony, (b) (7)(C)B.M.

2. Accused's PowerPoint Presentation, 13 Jun 08
3. Summarized Article 32 Testimony, (b) (7)(C) J.S.
4. Sworn Statement, (b) (7)(C) J.S.
5. Article 15 Packet
6. Summarized Article 32 Testimony, (b) (7)(C) P.B.
7. MRE 404(b) Notice, 6 Apr 11